

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK MICHAEL DRUZYSKI,

Defendant-Appellant.

UNPUBLISHED

July 20, 2010

No. 289521

Oakland Circuit Court

LC No. 2007-212928-FH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

After a jury trial, defendant Frank Michael Druzynski was convicted of one count of operating a vehicle while intoxicated (OUIL) causing death, MCL 257.625(4)(a), and one count of operating a vehicle while intoxicated (OUIL) causing serious injury, MCL 257.625(5). He was sentenced to concurrent terms of 7 to 15 years' imprisonment for the OUIL causing death conviction and two to five years' imprisonment for the OUIL causing serious injury conviction, with 109 days' credit for time served. He appeals as of right. We affirm.

Defendant's convictions arise from a November 2006 automobile accident in which his vehicle collided with a vehicle occupied by Richard and Ruth Ann Johnson. The accident occurred when defendant attempted to make a left turn at an intersection and drove into the path of the Johnsons' vehicle as it was proceeding through the intersection. Both Richard and Ruth Ann were injured in the accident, and Ruth Ann later died from her injuries. The parties stipulated that just after the accident, defendant had a blood-alcohol level of .25 grams of alcohol per 100 milliliters of blood. At trial, the prosecution presented evidence indicating that defendant was involved in two other alcohol-related driving incidents during the previous year, one in November 2005 when he struck a tree, and another in January 2006 when he struck a parked car in a parking lot. The parties stipulated that defendant's blood alcohol level was 0.11 grams of alcohol per 100 milliliters of blood during the November 2005 incident and 0.27 grams of alcohol per 100 milliliters of blood during the January 2006 incident. The defense theory at trial was that the charged accident was caused by Richard Johnson's excessive speed.

I. ADMISSIBILITY OF DEFENDANT'S PRIOR ALCOHOL-RELATED ACCIDENTS

First, defendant argues that the trial court erred in allowing the prosecutor to introduce evidence of his prior alcohol-related driving incidents under MRE 404(b)(1). We disagree. We review the trial court's decision to admit the challenged evidence for an abuse of discretion.

People v McDaniel, 469 Mich 409, 412; 670 NW2d 659 (2003). Any preliminary questions of law related to the admission of the evidence are reviewed de novo. *Id.*

MRE 404(b)(1) prohibits evidence of other bad acts to prove a defendant's character to show action in conformity therewith, but allows such evidence for a purpose other than proving the defendant's bad character. The logic behind this rule is that a jury should not "convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged." *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if the evidence is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In addition, upon request, the trial court may provide a limiting instruction for any evidence admitted under MRE 404(b). *Id.* at 75.

Under MRE 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

"[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)." *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Id.*, quoting *Crawford*, 458 Mich at 387; see also MRE 401.

The first two requirements for admissibility under MRE 404(b)(1) were clearly established in this case. Defendant was charged with OUIL causing death, which is comprised of the following elements:

- (1) the defendant was operating his or her motor vehicle in violation of MCL 257.625(1), (3), or (8); (2) the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and might be intoxicated; and (3) the defendant's operation of the motor vehicle caused the victim's death. [*People v Schaefer*, 473 Mich 418, 434; 703 NW2d 774 (2005); see also MCL 257.625(4).]

The evidence of defendant's prior alcohol-related driving incidents was offered to show that defendant knew that his consumption of alcohol might impair his ability to safely operate a vehicle. Thus, the evidence was offered for a proper noncharacter purpose under MRE 404(b)(1). Further, the evidence that defendant had been involved in two prior alcohol-related driving accidents during the previous year made it more probable that, with respect to the current

offense, defendant knew that he might be intoxicated when he voluntarily decided to drive his vehicle after consuming a bottle of rum.

Analysis of the third element presents a closer question, but we conclude that the trial court did not abuse its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Admittedly, the evidence created a potential for unfair prejudice because of the risk that the jury might react emotionally to the evidence and consider it for the improper purpose of deciding that defendant was a bad person who “did it before” and “probably did it again.” *Crawford*, 458 Mich at 398. However, that risk was minimized by the trial court’s cautionary instruction advising the jury that it could consider the prior incidents only for the purpose of deciding whether they “tend[] to show that defendant voluntarily decided to drive on November 18th, 2006 knowing that he had consumed alcohol and might be intoxicated or visibly impaired,” and that the jury could “not consider the evidence for any other purpose” and could not convict defendant because it might think he was guilty of other bad conduct. Further, the trial court found that the value of the prior incidents was “overwhelmingly probative” because they were of relatively recent vintage and both involved incidents in which, like this case, defendant struck another object with his vehicle while driving intoxicated. Thus, the prior incidents were highly probative of defendant’s knowledge that a similar event might occur if he again drove a vehicle after consuming an intoxicating agent.

We disagree with defendant’s argument that it was improper for the trial court to rely on *People v Werner*, 254 Mich App 528; 659 NW2d 688 (2002), as support for its analysis. In *Werner*, this Court upheld a trial court’s decision to admit evidence of a prior incident of drunken driving by the defendant under MRE 404(b)(1). *Id.* at 539. Although defendant contends that *Werner* is distinguishable because the defendant in that case was charged with second-degree murder, it was not the nature of the offense, but rather the purpose for which the evidence was offered (i.e., to show the defendant’s knowledge) that made the evidence admissible. The evidence in this case was likewise probative of defendant’s knowledge.

Further, the fact that defendant offered to stipulate that he had consumed alcohol, that he voluntarily drove, and that he might have been intoxicated or visibly impaired, did not preclude the trial court from admitting the prior incidents under MRE 404(b)(1). We believe that defendant’s reliance on *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), is misplaced, given that defendant was not charged with a mere status offense. The prosecution had the burden of proving every element of the charged crimes beyond a reasonable doubt, despite whether defendant specifically disputed or offered to stipulate to any of the elements. *Crawford*, 458 Mich at 389. Thus, we agree with the trial court that the prosecutor had the right to present the evidence and allow the jury to consider the facts and circumstances surrounding the prior incidents to determine what weight to afford that evidence, rather than simply accept defendant’s offer to stipulate.

In sum, the trial court did not abuse its discretion in determining that the probative value of the prior alcohol-related driving incidents was not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion in admitting evidence of the prior incidents.

II. ADMISSIBILITY OF EXPERT TESTIMONY

Next, defendant challenges the admissibility of Richard Ruth's expert testimony regarding the speed of the victims' automobile at the time of the accident, as recorded by a module in their vehicle. After conducting a two-day hearing pursuant to *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), the trial court determined that the principles and methods associated with crash data recorders were generally accepted within the scientific community and, therefore, Ruth's testimony was sufficiently reliable under MRE 702 to be admitted at trial.

Defendant does not directly challenge the scientific reliability of crash data recorders in general, but rather contends that Ruth's testimony should not have been admitted in this case because the validity of the data from the crash data recorder in the Johnsons' vehicle, which showed that the vehicle was traveling approximately 28 miles an hour, was "directly undermined" by the available physical evidence. Defendant relies on *Green v Jerome-Duncan Ford, Inc.*, 195 Mich App 493; 491 NW2d 243 (1992), to argue that Ruth's expert testimony was therefore inadmissible.¹ In *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999), this Court, applying *Green*, stated:

This Court has held that an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts. *Green*[, 195 Mich App at 499]; *Thornhill v Detroit*, 142 Mich App 656, 658; 369 NW2d 871 (1985). This is true where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation. *Green*, [195 Mich App] at 500.

Contrary to defendant's argument, the physical evidence did not establish that the speed determined from the recorded data from the module in the Johnsons' vehicle was "not in accord with the established facts." Defendant relies on the testimony of his expert, Thomas Bereza, who opined from his analysis of the physical evidence that the Johnsons' vehicle was traveling approximately 47 miles an hour, and possibly up to 52 miles an hour, at the point of impact. Bereza's opinion was based on his understanding of the final resting places of the vehicles, their relative positions at the point of impact, and the surrounding debris field. However, these were not matters of undisputed fact. Because the accident did not appear to involve any serious injuries at the time, an accident investigation was not conducted. Further, Bereza's interpretation of the evidence was disputed. Michigan State Police Sergeant Timothy Brown testified that he later attempted to reconstruct the accident, but there were too many unknown factors for him to calculate the speeds of the two vehicles. However, given the lack of significant debris or severe damage to the vehicles, he did not believe that speed was a factor in causing the accident. In sum, defendant has not established that the reliability of Ruth's testimony regarding the speed of the Johnsons' vehicle as determined from the data in the crash data recorder was undermined by other known evidence so as to render it inadmissible.

¹ MRE 703 also requires that the facts or data underlying an expert's opinion be in evidence.

Defendant also argues that Ruth's testimony did not meet the *Daubert* standard of reliability because only personnel from the company that developed the crash data recorder could retrieve the data and only that company had the necessary software to interpret the data. However, defendant does not explain how this violates *Daubert*. The trial court allowed a defense expert to be present during the download process, and defendant was free to explore that process at trial.

For these reasons, we reject this claim of error.

III. JURY INSTRUCTIONS

Next, defendant raises two claims of instructional error. He argues that the trial court erred in denying his request for an instruction based on MCL 257.649(5), which would have allowed the jury to find that Richard Johnson forfeited any right of way he may have had at the intersection if the jury found that he was speeding. He also argues that the trial court erred by denying his request for an adverse inference instruction based on the failure of the police to conduct an accident investigation at the time of the accident. "[A] trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation omitted). To the extent an instructional issue involves a question of law, our review is de novo. *Id.*

A. APPLICABILITY OF MCL 257.649(5)

MCL 257.649(5) provides, "The driver of a vehicle traveling at an unlawful speed shall forfeit a right of way which the driver might otherwise have under this section." A violation of this subsection is a civil infraction. MCL 257.649(8).

Defendant argues that he was entitled to an instruction that would have permitted the jury to find that if Richard Johnson was speeding, then Richard would have lost any right of way he might have otherwise had, thereby allowing the jury to find that defendant did not proximately cause the accident. We disagree.

In *Schaefer*, 473 Mich at 437-438, the Court explained that a defendant charged with OUIL causing death may not be liable if a superseding, intervening act by the victim or a third party severs the causal link between the defendant's actions and the victim's death. The Court explained, "While an act of God or the *gross* negligence or intentional misconduct by the victim or a third party will generally be considered a superseding cause, *ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable." *Id.* at 438-439 (emphasis in original). Here, the trial court properly instructed the jury on gross negligence.

Violation of a speed limit is generally inadequate to show gross negligence, unless it is done under other conditions, such as traveling at 100 miles an hour through a residential neighborhood, or by traveling at an inappropriate rate of speed in heavy traffic, on slick roads, or in fog. *People v McCoy*, 223 Mich App 500, 504; 566 NW2d 667 (1997). In this case, there was no evidence of speeds that were so excessive or took place under such conditions so as to constitute gross negligence. Rather, any speed violation in this case would have been ordinary negligence and, thus, reasonably foreseeable. Accordingly, any loss of right of way pursuant to

MCL 257.649(5) would not be regarded as a superceding cause severing the causal link between defendant's actions and the victims' injuries. Therefore, the trial court did not err in denying defendant's request for an instruction based on MCL 257.649(5).

B. INSTRUCTIONS ON THE FAILURE TO PRESERVE EVIDENCE

Defendant also argues that because the police did not conduct an accident investigation at the time of the accident, the trial court should have instructed the jury that "if you find that there was destruction of evidence you may infer that it's to the benefit or inures to the defendant's benefit." We disagree.

As defendant correctly observes, the prosecution is required to preserve evidentiary material that might be useful to a defendant. *People v Leigh*, 182 Mich App 96, 97-98; 451 NW2d 512 (1989). Further:

when the state fails to disclose to the defendant material exculpatory evidence, the good or bad faith of the state is irrelevant to a claim based on loss of evidence attributable to the government. Where, however, the state has failed to preserve evidentiary material of which no more can be said than that it could have been subjected to tests the results of which might have exonerated the defendant, the failure to preserve the potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the police. [*Id.* at 98 (citations omitted).]

In this case, however, there is no evidence that the police or the prosecutor failed to preserve evidentiary material. Rather, testimony at trial indicated that because it did not appear at the time of the accident that any of the victims were seriously injured, the police did not conduct an investigation that involved photographing the scene or taking measurements of relevant details. Thus, this case does not involve a situation where evidence was collected, but not preserved. A prosecutor does not act in bad faith, and a trial court does not err by failing to give an adverse inference instruction, where evidence is not produced because it "simply did not exist or could not be located." *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). Further, even if it would have been prudent to conduct an investigation, there was no evidence that the police acted in bad faith by failing to do so at the scene. Accordingly, the trial court did not err in refusing to give the requested adverse inference instruction.

IV. SENTENCING

Finally, defendant argues that the trial court erred by refusing to impose a sentence below the sentencing guidelines range of 43 to 86 months for his OUIL causing death conviction.

In *People v Kahley*, 277 Mich App 182, 186-187; 744 NW2d 194 (2007), this Court summarized the standards that apply to imposition of a sentence outside the guidelines range:

Generally, a trial court is required to impose a minimum sentence that falls within the recommended minimum sentence range. MCL 769.34(2); [*People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003)]. A trial court may only depart from the recommended sentence range if there is a substantial and

compelling reason for doing so. MCL 769.34(3); *Babcock*, [469 Mich] at 255-256. A substantial and compelling reason must be objective and verifiable, *id.* at 257-258, meaning that it is external to the minds of the trial court, the defendant, and others involved in making the decision, and is capable of being confirmed, *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). In addition, a substantial and compelling reason is one that keenly or irresistibly grabs the court's attention, and one the court recognizes as being of considerable worth in deciding the defendant's sentence. *Babcock*, [469 Mich] at 257. Substantial and compelling reasons to depart only exist in exceptional cases. *Id.* Further, MCL 769.34(3)(b) provides:

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

“We review for clear error the trial court's cited factors supporting its departure, we review de novo whether the factors are objective and verifiable, and we review for an abuse of discretion the trial court's determination that the factors constitute substantial and compelling reasons to depart from the recommended range.” *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008).

Defendant contends that the following factors support a downward departure from the guidelines range for substantial and compelling reasons: (1) he possesses a bachelor's degree and developed a career as an engineer in the automotive industry; (2) he has always been employed and started his own automotive design, building, and consulting business; (3) he is a lifelong resident of Birmingham, Michigan, and has owned a home there since 1994; (4) he is the sole caretaker for his 71-year-old mother; (5) he has the support of his family; (6) as a child, he was physically abused by his father until his father left the family when defendant was 13 years old; (7) in 1992, he lost his fiancée to ovarian cancer and thereafter began to suffer from severe depression; (8) he received his first ticket for OUIL in 1993, and thereafter became active in Alcoholics Anonymous by attending meetings, sponsoring other members, and running weekly meetings; (9) he remained sober from July 1996 to October 2005, but his resistance to alcohol was lowered by prescribed medication for depression; (10) the prior alcohol-related driving incidents in November 2005 and January 2006 were both related to the prescribed medication he was then taking; (11) at the time of both prior incidents, he was also taking the prescription sleep-aid Ambien and could not recall either incident, including either arrest, as a result of that medication; (12) at the time of the current offense, he was also taking prescribed medications that lowered his resistance to alcohol and prompted him to return to drinking to aid him in sleeping; and (13) since this offense, he has remained sober and has had no further violations while on a tether that detects alcohol as a requirement of his pretrial release.

Even accepting that these factors qualify as objective and verifiable, the trial court did not abuse its discretion in determining that they did not provide substantial and compelling reasons to deviate below the guidelines. Most significant is that the current offense was not an isolated event. Rather, it was defendant's fourth offense involving driving a vehicle while under the

influence of alcohol, and his third alcohol-related driving offense in the previous year. Moreover, he committed the instant offense while on probation for a prior OUIL conviction. Defendant's past accomplishments and past history of obtaining treatment for alcoholism cannot be recognized as of considerable worth when measured against his more recent history of alcohol-related driving offenses, the last of which led to the death of a victim. Further, it was not inappropriate for the trial court to disregard defendant's attempts to blame his more recent drinking problems on a lowered resistance to alcohol caused by prescription medication where defendant took no steps to address that problem and instead continued to drink and drive while intoxicated. The trial court did not abuse its discretion by declining to sentence defendant below the guidelines range.

Affirmed.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Donald S. Owens